

# MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

June 25, 2009

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## Via Hand Delivery

Ms. Laura Johnson  
Remedial Project Manager (3HS23)  
DE, VA, WV Remedial Branch  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Re: Peck Iron and Metal Site  
Portsmouth, Virginia

Dear Ms. Johnson:

On May 26, 2009, CSX Transportation, Inc. ("CSXT") received from Region III of the United States Environmental Protection Agency ("EPA") a letter advising CSXT that it may have potential liability for environmental conditions at the Peck Iron and Metal Site (the "Site") located in Portsmouth, Virginia pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"). Specifically, EPA asserted in this letter that it believes that CSXT "may be liable" under CERCLA with respect to the Site "as a person who arranged for disposal or treatment of hazardous substances sent to the Site" including lead, zinc and polychlorinated biphenyls ("PCBs"). EPA also described in this letter certain activities that it anticipates will take place in connection with the Site and encouraged CSXT to respond within thirty (30) calendar days to express its willingness or unwillingness to participate in future negotiations concerning the Site.

The purpose of this correspondence is to respond to EPA's letter to CSXT regarding the Site. As described in more detail below, we have not been able to identify any basis on which EPA has asserted that CSXT may have liability in connection with the Site. Accordingly, in the absence of additional factual information demonstrating that the predicates for liability under Section 107(a)(3) of CERCLA have been established,



CSXT is not inclined to participate in future negotiations regarding the Site.

As you may be aware, EPA issued to CSXT a request for information pertaining to the Site pursuant to Section 104(e) of CERCLA on June 11, 2008. CSXT responded to this request for information in a submittal from Jeff Styron, in-house counsel for CXT, to Joan Martin Banks, Civil Investigator for EPA, dated August 25, 2008. In that submittal, CSXT confirmed that after a reasonable inquiry and diligent search of currently available company records, it had been unable to find any documents or information indicating that CSXT or its predecessors had sent materials of any sort to the Site. Instead, the only records that CSXT located referring to the Peck Company or Peck Iron & Steel Company (or variants on those names) were (1) a Sublicense Agreement for a private road crossing for Peck Iron and Metal Company, Inc. to use a private road crossing near Ampt Hill in Chesterfield County immediately south of Richmond, Virginia, (2) a short-term lease for a very small parcel of land (approximately 380 square feet in size) in Richmond, Virginia to allow Peck Iron and Metal Company, Inc. to temporarily store a lathe, and (3) a Sidetrack Agreement and Bill of Sale for a segment of rail siding adjacent to Deepwater Terminal Road in Chesterfield County immediately south of Richmond, Virginia.<sup>1</sup> None of these documents pertain whatsoever to the Site.

In addition, on June 17, 2008, EPA provided to CSXT certain documents from EPA's files regarding CSXT's purported nexus with the Site. One of the documents provided by EPA is a solicitation letter from David Peck, Vice-President of Peck Iron & Metal Company, Inc. with an address of 3220 Deepwater Terminal Road in Richmond, Virginia, to Tom Robert Grady, Manager of Scrap & Equipment Sales for the Chessie System, dated January 25, 1983, indicating that Peck Iron & Metal Company "would like to bid for the metal scrap generated by the Chesapeake & Ohio Railroad." The letter does not begin to establish that CSXT or its predecessors ever sent materials to the Site. Indeed, as a solicitation letter, it indicates the lack of a business relationship between the Chesapeake & Ohio Railroad and Peck Iron & Metal Company at the time the letter was prepared.

The second set of documents provided by EPA to CSXT includes correspondence from Peck Iron & Metal Company, Inc. dated July 16, 1984, and November 19, 1986, respectively. These two letters refer to rail transportation services provided by CSXT or its predecessors pursuant to federal common carrier rules for the provision of routine rail transportation services. It is unclear from the letters whether these transportation services involved transporting materials to the Site. We note that in any event CERCLA expressly shields common carriers from liability associated with providing such rail transportation services. Specifically, Section 107(a)(4) of CERCLA provides that a transporter is not liable if it does not select the site to which hazardous substances are shipped. In the context of rail transportation, the shipper, by definition, rather than the railroad selects the destination for common carrier rail shipments, and the common

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<sup>1</sup> The Sidetrack Agreement and Bill of Sale transferred to Peck Recycling Company a segment of rail siding for use in connection with serving Peck Recycling Company with rail service. The track was not sold as scrap but as a working rail line to provide rail service to Peck Recycling Company at its facility just south of Richmond.

carrier is obliged by federal law to provide such transportation services. Moreover, the third party defense to liability under CERCLA is available to common carriers, notwithstanding the existence of a contractual relationship between a common carrier and the shipper when "the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail." See 42 U.S.C. § 9607(b)(3).

The third set of documents provided by EPA to CSXT consists of a proposal from Peck Iron and Metal Company, Inc. to Chessie Systems Railroads to demolish a pier in Newport News, Virginia. There is no documentation to indicate whether this proposal was accepted or whether the work proceeded. Moreover, CSXT found no records or information concerning this proposal in connection with its efforts to respond to EPA's request for information under Section 104(e) of CERCLA.

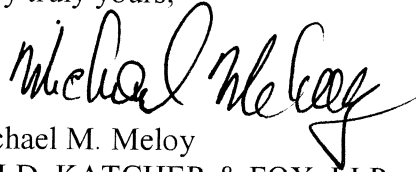
At this juncture, the record is devoid of any information or documentation from which we can discern grounds that would lead EPA to conclude that CSXT may have liability for conditions at the Site pursuant to Section 107(a)(3) of CERCLA. In the absence of any nexus to the Site, there is no reason for CSXT to be involved in negotiations with EPA regarding the Site. Should information in the future come to light to support a finding of liability under Section 107(a)(3) of CERCLA, CSXT may reconsider its position. In that regard, we request that if EPA has any further information or documentation that it believes shows a nexus between CSXT and the Site, EPA share that information with us as expeditiously as practicable.

We note in closing that based on the information provided by EPA as part of its letter to CSXT of May 20, 2009, and that can be gleaned through readily accessible publicly available information, the Site was used to recycle various types of metals. In recognition that well-established markets for recyclable metals have existed for many years that are quite different than transactions involving the disposal or treatment of wastes, Congress amended CERCLA in 1999 by passing the Superfund Recycling Equity Act ("SREA") which added what is now Section 127 of CERCLA to the statute. SREA was designed to clarify the scope of liability under CERCLA and to make clear that those who arranged for recycling of a recyclable material are not to be held liable under Section 107(a)(3) of CERCLA, provided that certain specified criteria are met. See 42 U.S.C. § 9627. More recently, in an opinion issued last month in *Burlington Northern & Santa Fe Railway Co. v. United States*, the United States Supreme Court clarified that for arranger liability under Section 107(a)(3) of CERCLA to attach, the person or entity in question must have transferred a hazardous substance with an intent to dispose of that substance. The Supreme Court consequently held that the sale of a material without the intention to dispose of that material fell outside the ambit of liability under Section 107(a)(3) of CERCLA. These issues are likely to be relevant as EPA moves forward with its activities in connection with the Site and will certainly be germane to the type of liability that EPA has asserted CSXT may have in connection with the Site.

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Please do not hesitate to contact me if you should have any questions regarding this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael M. Meloy". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Meloy".

Michael M. Meloy  
For MANKO, GOLD, KATCHER & FOX, LLP

MMM/dm

cc: Jeffrey W. Styron, Esquire